STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN WILLIAM BEHM,

Plaintiff-Counter Defendant-Appellee,

v

WALLY CROSS,

Defendant-Cross Defendant Appellant,

and

NORTH SAILS DETROIT,

Defendant-Cross Defendant-Appellant.

UNPUBLISHED
July 19, 2005

No. 252711
Macomb Circuit Court
LC No. 2000-004774-NZ

STEPHEN WILLIAM BEHM,

Plaintiff-Counter Defendant-Appellant,

v

WALLY CROSS,

Defendant-Cross Defendant-Appellee,

and

NORTH SAILS DETROIT,

Defendant-Cross Defendant-Appellee.

No. 253844
Macomb Circuit Court
LC No. 2000-004774-NZ

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In these consolidated cases, defendants appeal as of right the trial court's finding in favor of plaintiff on his breach of contract and fraudulent misrepresentation claims. Plaintiff appeals as of right the trial court's failure to award sanctions against defendant. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

A. Factual Background and Proceedings Below

In the spring of 1999, plaintiff Stephen Behm contacted defendant Wally Cross at an e-mail address belonging to defendant North Sails Detroit. In a series of e-mails and telephone calls, plaintiff and defendant entered into an agreement, not otherwise reduced to writing, that defendants would find a racing yacht for plaintiff to use in the annual Port Huron-Mackinac yacht race scheduled to begin on Saturday, July 17. On March 26, plaintiff issued a $10,000 check payable to North Sails Detroit as a deposit and defendant Cross began to search for a boat. In May, he located an appropriate yacht that had been recently purchased by Tom Lindemann of Milwaukee, Wisconsin. The yacht was approved by plaintiff, and defendants entered into an agreement with Lindemann for the charter of the boat for lease and use by plaintiff. Plaintiff paid an additional $7,054.50 on July 2, the balance of the charter fee owed to defendants.

Lindemann raced the yacht the weekend preceding the Port Huron-Mackinac race, in the Chicago to Mackinac competition. Thereafter, defendants hired a transport crew to motor the boat from Mackinac to Port Huron for plaintiff's use. The crew experienced mechanical and other problems and the head of the crew contacted Cross to say that the boat was "barely functional." Cross contacted plaintiff on Wednesday, July 14, to advise him that it was impossible to fulfill the charter and offered to return the amount plaintiff had paid. However, plaintiff wanted to complete his plans for the race and offered defendant Cross an additional $10,000 to undertake whatever efforts were necessary to get the yacht ready on time. Further, plaintiff purchased new batteries for $1,000, and paid an additional $3,000 to secure the help necessary to attempt to get the electrical system in order.

At some point during the cleanup/repair process, Cross was asked where the boat's registration was and he allegedly said "somewhere down below," apparently meaning they were in the usual place such records would be stored, the navigation station. However, no one actually checked to see if the registration papers were, in fact, on the boat.

Notwithstanding everyone's best efforts, the boat continued to experience problems during the race. Most notably, its electrical system failed, requiring the crew to use handheld navigational equipment instead of on-board equipment. Nonetheless, plaintiff and his crew were able to complete the race, admitting that they had a good time doing so, and finished quite well.

Following the race, the crew of the boat was approached by a Department of Natural Resources (DNR) officer who questioned whether the boat was properly registered. Plaintiff explained that he was not the owner but assumed that it was. Plaintiff had to leave to check in with race officials or risk disqualification so he gave the DNR officer, who apparently did not know exactly how to handle the situation, his driver's license. After reviewing the situation further and not being provided proof of registration, the DNR officer issued a ticket against

plaintiff, as skipper of the vessel, and gave the ticket to plaintiff's crew chief. The crew chief came across defendant Cross (who had also participated, on another boat, in the race). Cross told the crew chief that he would handle the ticket. Plaintiff never saw the ticket and he and his crew considered it nothing more than a minor inconvenience that was not their responsibility.

Defendant Cross assumed that Lindemann had properly registered the boat in some state, probably Wisconsin, meaning that an appropriate sales tax had been paid for its purchase. Thus, Cross assumed that the ticket made out against plaintiff resulted from confusion regarding the fact that the boat did not have an "MC" license number on its side. Such license numbers, while ordinary, are not required if a vessel is documented with the U.S. Coast Guard, and the boat was so documented. Cross sent a letter to the St. Ignace District Court, which had enforcement authority over the DNR ticket, explaining that the boat was properly documented with the Coast Guard. The letter stated that Lindemann should be called with any further questions and also supplied both Lindemann's and Cross's phone numbers. Cross assumed that this addressed the ticket problem when he never heard back from the district court.

However, even a boat documented with the Coast Guard has to be registered in some state. Accordingly, the district court did not conclude that the matter was resolved because of the Cross message regarding documentation. Further, the district court did not attempt to correspond with Lindemann or Cross regarding the issue, but, instead, attempted to correspond with plaintiff (who had since returned to his home in California) as the person against whom the ticket had been issued. Plaintiff claims that he never received any of the court's notices regarding the outstanding ticket.

The following year, plaintiff again sailed in the Port Huron-Mackinac race, this time using a new boat he had purchased for that purpose. Again, he was approached by the authorities at Mackinac regarding the outstanding registration ticket issue. He was arrested in front of his friends, family, and colleagues, and held for some time in both the Mackinac Island and St. Ignace jails. When plaintiff learned the reason for his arrest, he immediately contacted Cross who immediately contacted Lindemann who immediately made payment of the outstanding sales tax to secure Wisconsin registration, proof of which was faxed to St. Ignace. As a result, plaintiff was released from custody within hours of his initial arrest. However, during the process, he had pled guilty to operating an unregistered boat and was fined $500.

There was ample trial testimony from both plaintiff and others involved about the extreme humiliation and embarrassment he suffered as a result of his arrest. The incident purportedly destroyed his plans to continue sailing on his new boat with his family and, following that, take a motor tour of the continental United States. Further, as a result of the incident, plaintiff claims to be unable to have any association with Michigan, his home state, including continuing to participate in Port Huron-Mackinac races as he traditionally has. Further, plaintiff's family is closely associated with law enforcement and the fact that he pled guilty to a criminal offense is highly offensive to him. Thus, he spent $22,000 on legal fees to have his guilty plea/criminal record expunged.

In an opinion rendered from the bench, the trial court concluded that there was a breach of the contract between the parties. Defendant promised plaintiff a turnkey boat ready to go without any worries, but, instead, the boat was a filthy mess, mechanically inadequate and not ready for the race. Further, the contract included a promise that a boat would be made available

to plaintiff on the Tuesday before the race, allowing him ample time to make preparations. Although defendant suggested that the contract should be voided when the boat showed up late and in bad condition, the trial court concluded that the contract was reaffirmed when defendant Cross accepted an additional $10,000 from plaintiff to get the boat in order. The contract between the parties was further broken because the boat was not properly registered; the trial court concluded that it was not plaintiff's responsibility, nor the responsibility of his crew, to discover that this was a problem.

The trial court awarded breach of contract damages of $17,054.50 (the original charter fee) plus $10,000 (the additional charter payment), plus $1,000 (for the purchase of batteries), plus $3,000 (to provide for electronic repairs). In addition, plaintiff was awarded the $22,000 he had spent to secure legal assistance in having the criminal record resulting from his guilty plea expunged. Further breach of contract damages awarded to plaintiff included the $500 fine he had to pay (for pleading guilty to operating an unregistered boat) as well as the $1,200 paid to a psychologist for an evaluation of the emotional damages he suffered as a result of his arrest. All tolled, the damages awarded to plaintiff for the breach of contract were $54,754.50.

The trial court further found that defendant had misrepresented to plaintiff that he would provide a turnkey boat with proper registration; that the registration documentation was in the boat; that he would take care of the ticket plaintiff received and that he did, in fact, take care of that ticket. The trial court characterized these misrepresentations as both "false" and "reckless." With little further analysis, the trial court determined that defendant was liable for damages arising from the misrepresentations.

As a method of computing the value of the emotional distress that plaintiff suffered as a result of the misrepresentations, the trial court began with plaintiff's life expectancy of thirty-six years (attested to by an expert witness). The trial court determined a per year value for the emotional distress based on the value of the yacht race in which plaintiff will no longer be able to participate and the distress preventing his return to Michigan for any purpose. The trial court expressed surprise that an accomplished person like plaintiff would suffer so as the result of an arrest, but basically concluded that his testimony that he did was credible. The trial court took the $17,000 needed to lease a yacht for the race in this case, added $3,000 per year to account for inflation, and multiplied the resulting $20,000 times the thirty-six years of life expectancy to arrive at an emotional distress damage amount of $720,000. Adding that to the damages from the breach of contract claim made the judgment against defendants total $774,754.50.

B. Breach of Contract Issues

Defendant argues that the trial court clearly erred in entering judgment in favor of plaintiff in the amount of $54,754.50 for breach of contract. We find that the trial court properly entered judgment in favor of plaintiff for breach of contract; however, remand is necessary to reduce damages which are not recoverable in a contract action.

This Court reviews a trial court's findings of fact in a bench trial for clear error and reviews de novo its conclusions of law. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 652. Moreover, this Court defers to the trial court's superior ability to

observe and evaluate witness credibility, and will not "set aside a nonjury award merely on the basis of a difference of opinion." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002), quoting *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000).

Defendants first argue that they were not the proper parties against which judgment should have been entered, and that judgment should have been entered against Total Yacht Management because Cross was merely an agent of Total Yacht Management, and North Sails Detroit was merely doing business as Total Yacht Management.

Defendants argue that defendant Cross is not liable for breach of contract because he was merely acting as an agent of Total Yacht Management. It is generally understood that "an agent may work on behalf of a principal within the scope of the agency agreement as if the agent had stepped into the shoes of the principal without incurring any personal liability." *PM One, Ltd v Dep't of Treasury*, 240 Mich App 255, 266-267; 611 NW2d 318 (2000). However, an agent may be held personally liable when he acts only on his own behalf rather than on behalf of the principal. *Baranowski v Strating*, 72 Mich App 548, 558-559; 250 NW2d 744 (1976). Here, the evidence adduced at trial demonstrated, for example, that all of plaintiff's contacts were with defendant Cross: plaintiff and defendant Cross exchanged approximately forty telephone calls, and plaintiff sent numerous e-mails to, and received numerous e-mail from wally@northsails.com. This and other evidence regarding Cross's personal participation in the contract is sufficient to conclude that defendant Cross acted on his own behalf as a contracting party. In the absence of a written contract identifying the contracting parties, the trial court's factual finding that defendant Cross was a proper party liable for breach of contract was not clearly erroneous.

Defendants also argue that North Sails Detroit is not liable for breach of contract because it was merely doing business as, or operating under an assumed name for, Total Yacht Management. An assumed-name certificate under MCL 450.1217 could only provide protection to Cross, as an agent of Total Yacht Management, if Total Yacht Management was otherwise undisclosed. *Penton Publishing, Inc v Markey*, 212 Mich App 624, 626-627; 538 NW2d 104 (1995). It provides no protection to North Sails Detroit the assumed-name entity of which plaintiff was fully aware.

Defendants next argue that the trial court clearly erred in finding that a breach of contract occurred when they failed to deliver a yacht to plaintiff on the Tuesday before the race, because the delivery date was left open in accordance with the nature of yacht racing and transport, and the writings between the parties were silent concerning a certain delivery date. Specifically, defendants argue that the trial court erred in inserting an implied performance date into the original oral contract. However, our Supreme Court has noted that when no time for performance is specified in a contract, a reasonable time is implied. *Smith v Michigan Basic Prop Ins Ass'n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992).

At trial, plaintiff testified that the contract was for a one week yacht rental to be delivered on the Tuesday before the race, July 13, consistent with pre-race socializing and practice. Further, plaintiff testified that he did not make arrangements to stay in a hotel because he believed he could stay on the yacht when he arrived on Tuesday, defendant Cross knew that plaintiff was scheduled to arrive on Tuesday, and plaintiff's crew was scheduled to start arriving

on Tuesday to practice. To support their claim, defendants proffered the testimony of three sailors that delivery on July 13 would have been impossible because the yacht was used in the Chicago to Mackinac race starting on July 10 and ending on July 12 or 13, and that a reasonable delivery date would have been July 14 or 15. Defendants argue that any expectation on plaintiff's part that the yacht would be delivered on July 13 was subjective and unilateral. Although defendants disputed plaintiff's testimony, the trial court found plaintiff to be a "very credible" witness, and its apparent conclusions that the Tuesday before the race was a reasonable time for delivery, that the parties originally agreed to a Tuesday delivery, and that defendants' failure to deliver the yacht on Tuesday constituted a breach of the original contract were not clearly erroneous.[1]

In any event, there was ample evidence to support the conclusion that defendants breached the contract by failing to deliver a "turnkey" boat, as promised. We reject defendants' arguments that no breach of contract occurred because, for example, plaintiff was ultimately able to finish the race albeit without a functional installed navigation system. "When performance [of a duty under a contract] is due . . . anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial." 2 Restatement Contracts, 2d, § 235, p 211-212, Comment b. See also *Woody v Tamer*, 158 Mich App 764, 771-772; 405 NW2d 213 (1987).

Defendants argue that plaintiff waived any breach when he elected to "reform" the contract and pay defendants additional money, beyond the contract price, to get the boat in shape for the race. It is well settled that an oral contract may be orally rescinded or modified. *Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc*, 370 Mich 334, 339; 121 NW2d 836 (1963). Our Supreme Court has held that a waiver of contract rights "can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract." *Quality Products and Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). The trial court did not clearly err in concluding that plaintiff's efforts to assure his participation in the yacht race (by taking steps necessary to get the boat ready) failed to sufficiently establish an agreement on his part to waive his right to remedies for the prior contract breach.

Defendants next argue that the trial court erred as a matter of law in awarding damages beyond the $17,054.50 value of the original contract. "The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed. Accordingly, the goal in contract law is not to punish the breaching party, but to make the

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[1] Defendants specifically take issue with the trial court's finding that it was irrelevant that it became impossible for the yacht to be delivered on the Tuesday before the race. Indeed, it was defendants' selection of the Lindemann boat for plaintiff to lease that rendered the Tuesday delivery date virtually impossible, and defendants should not be relieved of liability by a reasonably foreseeable circumstance of their own creation. *Bissell v L W Edison Co*, 9 Mich App 276, 284; 156 NW2d 623 (1967). Accordingly, the trial court properly concluded that the issue of impossibility was irrelevant.

nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-626; 544 NW2d 278 (1996).

The trial court's award of damages to plaintiff was based, in part, on an apparent factual finding that plaintiff received nothing in return for the payments he made for the ill-fated yacht excursion. Thus, to "make him whole," he was entitled to recover all out-of-pocket expenses he paid for that excursion, including the $27,054.50 paid to defendants for the yacht lease, the $1,000 plaintiff paid to purchase new batteries for the yacht, and the $3,000 plaintiff paid to secure needed electronic repairs. Although the trial court's factual finding that plaintiff received nothing in return for his payments might be questioned in light of the crews' assessment that the yacht race was a success and a good time, we do not conclude that these awards of damages can properly be reversed as a matter of law on appeal.

While defendants argue that contract damages must be limited to the "contract price" (apparently meaning the initial $17,054.50 agreed upon), that approach seems unduly restrictive under the facts of this case and, in addition, is contrary to precedents where this Court has approved damages to reimburse for incidental expenses paid by a nonbreaching party, as a result of a breach and in an attempt to secure the benefits of a bargain. See, e.g., *Dierickx v Vulcan Industries*, 10 Mich App 67, 78-79; 158 NW2d 778 (1968). Thus, we affirm the trial court's award of $31,054.50 to reimburse plaintiff for the out-of-pocket expenses he directly incurred as a result of defendants' breach of the contract. That includes the $3,000 paid to a "principal/agent" of Total Yacht Management even though Total Yacht Management was not a defendant here; that is irrelevant to the fact that the payment was made by plaintiff as a result of defendants' breach of the contract.

Plaintiff is correct, however, in pointing out that not every expense incurred as a result of a contract breach is properly reimbursable. Ever since *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854), the rule has been that "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980). The trial court did not find, and the record does not suggest in any way, that the parties contemplated at the time they made their contract that any criminal problems could "arise naturally" from a breach of the contract by defendants. Accordingly, the trial court erred as a matter of law in awarding plaintiff damages based on the costs he incurred in paying the criminal fine ($500) and in securing legal assistance to have his criminal record expunged ($22,000). Therefore, we reverse the trial court's award of damages to plaintiff for those amounts.

Further, "it is generally held that damages for mental distress cannot be recovered in an action for breach of a contract." *Id.* at 415. While there are exceptions to that general rule in cases involving bodily injury or contracts for certain personal services, *id.*, those exceptions do not apply to this relatively standard contract for the lease of personal property. Accordingly, the trial court erred as a matter of law in awarding plaintiff $1,200 to reimburse him for fees paid for a psychological examination of the emotional distress he claims to have suffered as a result of the breach of contract and ensuing criminal case.

In sum, with respect to the breach of contract damages awarded to plaintiff, we affirm as to his out-of-pocket expenses directly related to the yacht rental ($31,054.50), but reverse the remainder of the damage award ($23,700).

C. Fraudulent Misrepresentation Issues

Defendant argues that the trial court clearly erred in entering a judgment in favor of plaintiff in the amount of $720,000 for fraudulent misrepresentation. We agree.

This Court reviews a trial court's findings of fact in a bench trial for clear error and reviews de novo its conclusions of law. *Ambs, supra* at 651. "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 652.

To constitute fraudulent misrepresentation, a defendant's representation must be knowingly false or made recklessly, without any knowledge of its truth. *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). Fraud must be established by clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).

Here, the trial court concluded that the evidence supported a claim for fraudulent misrepresentation regarding several statements defendant Cross allegedly made to plaintiff. At issue here are the statements that allegedly were associated with the criminal charge for which damages were awarded—to the effect that the yacht was properly registered for the race and, later, that defendant Cross had resolved the ticket issue. There is no suggestion that Cross made these statements knowing they were false. Neither is there evidence upon which to conclude that they were made recklessly, without regard for that truth.

Instead, the record shows that defendant Cross relied on the fact that Lindemann, the Wisconsin purchaser of the yacht, was a wealthy person who would not risk the consequences of sailing the yacht without paying a relatively minor sales tax. Because Lindemann had sailed in the Chicago-Mackinac race shortly before the yacht was delivered for plaintiff's use, Cross reasonably concluded that the yacht was properly registered. At worst, the record shows only that Cross was merely negligent in not taking any action to further confirm the registration.

Regarding defendant Cross' statement about taking care of the ticket with the St. Ignace District Court, again, the most that the evidence will support would be a finding of negligence. Basically, defendant Cross fell prey to confusion between Coast Guard documentation and state registration. Further, he reasonably could have assumed that, if any continuing problem existed with the ticket after he corresponded with the district court, he would likely be contacted (because his phone number was on the letter) or Lindemann would be contacted (as directed in the letter). Either way, Cross could assume that the problem could be further addressed without any negative impact on plaintiff. Similarly, Cross reasonably could have assumed that, failing to contact either himself or Lindemann, the district court would effectively notify plaintiff, the recipient of the ticket, who would then notify defendant Cross, alerting him to the need for further action. In sum, the record does not suggest that defendant Cross made a false or reckless statement when he opined that he had effectively taken care of the ticket after he contacted the district court.

The trial court clearly erred in finding that the evidence supported plaintiff's claim for fraudulent misrepresentation, and we reverse the trial court's judgment in favor of plaintiff. As discussed earlier, the fraudulent misrepresentation claim alone might warrant the imposition of any emotional distress damages; the breach of contract claim could not result in that type of damage recovery. *Kewin, supra* at 415. Therefore, we need not consider defendants' subarguments concerning the trial court's characterization of those damages as exemplary, whether the damages were excessive, and whether the trial court should have allocated some fault to plaintiff to reduce the damages.

D. Sanctions

Plaintiff argues that the trial court clearly erred in denying plaintiff's motion for costs and fees under MCL 600.2591. We disagree.

"This Court reviews a trial court's finding regarding whether an action is frivolous for clear legal error." *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 35; 666 NW2d 310 (2003). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Upon motion of a party, if a court finds that a defense to a civil action was frivolous, the court shall award the costs and fees incurred by the prevailing party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney. MCL 600.2591(1). A defense is frivolous when at least one of the following conditions is met: (1) the party's primary purpose in asserting the defense was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true; and (3) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(i)-(iii).

Regarding the breach of contract claim, plaintiff argues that defendants' admissions that they failed to provide plaintiff with a turnkey boat, i.e., a boat that was ready to operate and properly registered, prove that their defenses were frivolous. That is, plaintiff argues that defendants had no reasonable basis to believe that the facts underlying their legal position were in fact true, and/or that defendants' legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(ii) and (iii). However, defendants correctly assert that their primary defense was that they were not the proper parties to be held liable for breach of contract, and that regardless of any admissions made at trial, they had a reasonable basis to believe that the facts underlying their legal position were true and that their position had legal merit. Further, despite our conclusion that the trial court did not clearly err in finding that defendants were liable for breach of contract, defendants had a reasonable basis to argue that there was no agreed-upon delivery date and that plaintiff waived the breach of the original contract by agreeing to a later delivery. The mere fact that defendants did not ultimately prevail in defending the breach of contract claim does not render their defenses frivolous, and the trial court did not clearly err in finding that the defenses proffered by defendants were not devoid of arguable legal merit. *Kitchen, supra* at 662.

Regarding the fraudulent misrepresentation claim, plaintiff argues that defendants' admissions that they failed to provide plaintiff with a turnkey, legally registered boat, and that defendant Cross did not take the necessary steps to resolve the ticket issue, prove that defendants

had no reasonable basis to believe that the facts underlying their legal position were in fact true, and/or that defendants' legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(ii) and (iii). However, as set out above, the trial court clearly erred in concluding that the evidence supported a claim of fraudulent misrepresentation, and, accordingly, its finding that the defenses proffered by defendants were not devoid of arguable legal merit was not clearly erroneous.

Plaintiff also argues that the trial court clearly erred in failing to find that defendants' primary purpose in asserting its defenses was to harass, embarrass, or injure him. MCL 600.2591(3)(a)(1). Plaintiff supports this assertion with defendant Cross' alleged post-trial comment to plaintiff to "have fun collecting." However, "[t]o determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at the time they were made." *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). Therefore, even if defendant Cross made such a statement, it was merely in response to the trial court's ruling against him, long after defendants denied the allegations of plaintiff's complaint.

Plaintiff also argues that the trial court clearly erred in failing to address the conditions constituting frivolousness under MCL 600.2591(3)(a)(i) and (ii). However, plaintiff fails to cite authority to support his assertion that the trial court must make findings on all three conditions constituting frivolousness when deciding a motion for costs and attorney fees under MCL 600.2591. And "[a] party may not leave it to this Court to search for authority to sustain or reject its position." *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57 (2000). Moreover, the trial court's finding that defendants' legal position was not devoid of arguable legal merit, coupled with its denial of plaintiff's motion for costs and sanctions under MCL 600.2591, evidences the trial court's implicit finding that the defenses proffered by defendants were not frivolous under any of the conditions set out in the statute.

Finally, defendants have requested that sanctions be imposed against plaintiff for a vexatious appeal under MCR 7.216(C)(1)(a). However, the court rule provides that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8), which provides that a request for sanctions must be made by motion—a brief on appeal is insufficient to request sanctions, and there is no indication that defendants filed a motion for sanctions in this Court. Further, on the merits, we would not conclude that plaintiff's appeal is vexatious.

E. Conclusion

The trial court properly entered judgment in favor of plaintiff for breach of contract, and we affirm the damages awarded to plaintiff for certain out-of-pocket expenses he incurred as a direct result ($31,054.50). However, we reverse the remainder of the damages award ($23,700), as not being recoverable in a contract action. The trial court clearly erred in concluding that the evidence supported a claim for fraudulent misrepresentation, and we also reverse that portion of the judgment ($720,000). The trial court properly declined to award sanctions against defendants under MCL 600.2591, and we affirm that decision.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter